Filed 2/28/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SELVIN O. GUEVARA, Defendant and Appellant.	2d Crim. No. B182951 (Super. Ct. Nos. 2003028155, 2004002458) (Ventura County)

Selvin O. Guevara appeals the judgment entered after a jury convicted him of misdemeanor battery (Pen. Code[1], § 243, subd. (e)(1)), misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)), and felony resisting an executive officer (§ 69). He assigns multiple claims of error, and also asks us to review the sealed transcript of the hearing held pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to determine whether the court correctly determined that there were no discoverable complaints regarding the police officers involved in the case.

In an unpublished opinion, we originally rejected all of Guevara's claims and affirmed the judgment in its entirety. We subsequently granted Guevara's petition for rehearing. We now conclude that the matter must be remanded for a new *Pitchess*

* Pursuant to rules 976(b) and 976.1 of the California Rules of Court, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

1 Further statutory references are to the Penal Code, unless otherwise noted.

hearing. Accordingly, we conditionally reverse the judgment and remand for that purpose.

[[We reject Guevara's contentions (1) that the trial court abused its discretion in granting the People's motion to consolidate the charges for purposes of trial; (2) that the court violated his due process and fair trial rights by admitting prior acts of domestic violence and resisting arrest pursuant to Evidence Code sections 1101 and 1109; (3) that the court committed instructional error in giving a modified version of CALJIC No. 2.50.02; (4) that the prosecutor committed misconduct during her closing argument; (5) that the court abused its discretion in excluding certain evidence offered to impeach one of the arresting officers; (6) that the court erred in failing to instruct the jury on misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)) as a lesser included offense to the felony resisting charge; (7) that the court abused its discretion in declining to reduce the section 69 conviction to a misdemeanor; and (8) that the court abused its discretion in refusing to grant probation.]]

FACTS AND PROCEDURAL HISTORY

The Charged Offenses

On August 26, 2003, Guevara, who is six feet four inches tall and weighs approximately 270 pounds, slapped his girlfriend, Sheila Silva, during an argument at their house. He also threw a plastic lighter at her, striking her on the forehead. Silva called the police, and the responding officer observed swelling to her right eye. Guevara initially denied hitting Silva, but subsequently claimed that he had accidentally elbowed her in the eye while they were struggling over their infant child during an argument. He admitted striking Silva on the buttocks when she walked away with the child.

In January of 2004, Silva obtained a restraining order against Guevara. On the afternoon of January 20, 2004, Silva and her father went to Guevara's house to pick up some of Silva's property. Simi Valley Police Officers John Samarin and Larry Maher were at Guevara's house following up on an earlier domestic violence incident between

Guevara and Silva. Officers Steve Prchal and Pat Zayicek were dispatched to the scene to help keep the peace while Silva recovered her property.

As Silva and her father began moving property from a car in the driveway to Silva's father's car, Guevara came out of the house and demanded that Silva not take any of her property. Guevara yelled obscenities and tried to talk to Silva. Officer Samarin warned Guevara that he was in violation of the restraining order. Guevara went back into the house, but returned to the front yard a few moments later and began yelling at Officer Maher. Officer Samarin advised Guevara that he could be arrested for violating the restraining order, but Guevara continued to yell obscenities.

When Guevara began pacing in front of the house, Officer Maher grabbed him by the shirt and Officer Samarin advised him that he was under arrest. Guevara struck Officer Maher's arm to free himself, then jumped over a short fence and began running toward Silva. As he continued running down the street, all four officers pursued him. Guevara ignored demands to stop and raised his fists. Officer Samarin caught up with Guevara and struck him once on the left shoulder with his baton. Officer Maher then tackled Guevara and forced him to the ground. Guevara screamed, flailed his arms and legs, and tried to kick the officers as Officer Maher attempted to handcuff him. Officer Samarin struck Guevara's legs three times in an effort to subdue him, while Officer Prchal made two "distraction strikes" to Guevara's face. Guevara was ultimately handcuffed and placed in a patrol car, then transported to the hospital to obtain treatment for minor injuries to his face and lower right leg.

At trial, Guevara defended against the resisting charges (§§ 69, 148, subd. (a)(1)) on the theory that the officers had used excessive force in effectuating his arrest.[2]

---

[2] The jury was instructed with CALJIC No. 9.29, as follows: "In a prosecution for violation of Penal Code Sections [243(b), 148(a), 69], the People have the burden of proving beyond a reasonable doubt that the peace officer was engaged in the performance of his duties. [¶] A peace officer is not engaged in the performance of his duties if he . . . uses unreasonable or excessive force in making or attempting to make the arrest. [¶] If you have a reasonable doubt that the peace officer was . . . using reasonable force in making or attempting to make the arrest and thus a reasonable doubt that the officer was engaged in the performance of his duties, you must find the defendant not guilty of any

Van Ness Bogardus, a former Los Angeles County Sheriff's deputy and law enforcement instructor, opined that the officers had used excessive force in arresting Guevara. Bogardus was not aware, however, that Guevara had been involved in prior incidents of domestic violence and had resisted arrest on a prior occasion. In rebuttal, Ventura County Sheriff's Sergeant John Miller testified to his opinion that the officers' use of force was reasonable under the circumstances and that the prior domestic violence incident was relevant to the officers' actions.

Prior Domestic Violence Incidents

On October 2, 2002, Guevara broke a door open after Silva locked him out of their apartment during an argument. When Silva threatened to call the police, Guevara grabbed her face.

On January 8, 2004, Guevara grabbed Silva by the mouth during an argument. When Silva attempted to call the police, Guevara struggled with her over the telephone, causing it to break. Guevara then threw a television remote control at Silva, striking her on the left wrist. Silva called the police, and Officers Samarin and Maher responded to the scene. Guevara resisted the officers' attempt to arrest him, and had to be forced down onto the bed in order to be handcuffed.

The jury convicted Guevara of misdemeanor battery against Silva, felony resisting an executive officer (Officer Maher), and misdemeanor resisting, obstructing, or delaying a peace officer (Officer Samarin). The jury acquitted Guevara on the charge of battery upon Officer Maher (§ 243, subd. (b)).]]

DISCUSSION

I.

Pitchess Motion

Prior to trial, Guevara moved for access to the confidential personnel records of the police officers involved in the case pursuant to *Pitchess v. Superior Court*,

---

crime which includes an element that the peace officer was engaged in the performance of his duties."

supra, 11 Cal.3d 531. Guevara's motion sought "the names, addresses of any witnesses and any relevant police department reports concerning any complaints that might reflect on the credibility of the officers involved in this matter, including any and all reports that may concern any suspected crimes of moral turpitude." At an in camera hearing held on April 24, 2004, the court found no discoverable documents. Guevara seeks our review of the sealed transcript of that hearing to determine whether the court's ruling was correct. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.)

In our original opinion, we indicated we had reviewed the sealed transcript of the hearing and determined that the court did not abuse its discretion in concluding that Guevara was not entitled to any discovery. Guevara petitioned for rehearing on the ground that the opinion did not state we had actually reviewed the documents the trial court had examined in adjudicating the motion. We granted rehearing, and now conclude that the matter must be remanded for a new hearing because the record is insufficient for us to determine whether the trial court properly exercised its discretion in denying discovery.

At the in camera hearing, the custodian of records for the Ventura City Police Department stated under oath that none of the involved officers' personnel files contained any information that was potentially responsive to Guevara's discovery request. Accordingly, no documents from the personnel files were submitted to the court for review, and on that basis the court determined that Guevara was not entitled to any discovery. The city attorney also stated that "just for the record, here is to be sealed a list for the four officers and what Sergeant Fitzpatrick [the custodian of records] did and examined and the case to show there was nothing relevant." The record does not reflect that the court actually reviewed that list, and the document was not forwarded to us as part of the record on appeal. Subsequent efforts to locate that document for inclusion in the record have been unsuccessful.

Although not stated in our original opinion, we concluded that the trial court did not abuse its discretion in finding no discoverable documents because the

custodian of records was required to provide only those documents that were potentially relevant to Guevara's specific discovery request. (See *People v. Mooc, supra,* 26 Cal.4th at p. 1228.) In light of that proposition, we reasoned that the custodian's sworn statement that there were no potentially discoverable documents was all the court needed to make its determination.

On further consideration, we are persuaded that the sealed list contained information that was essential to the court's evaluation of the *Pitchess* motion. Although the custodian of records was required to submit for review only those documents that were potentially responsive to the discovery request, our Supreme Court has directed that "[t]he custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*People v. Mooc, supra,* 26 Cal.4th at p. 1229.) Moreover, "if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court." (*Ibid.*)

Accordingly, in cases such as this where the custodian of records does not produce the entire personnel file for the court's review, he or she must establish on the record what documents or category of documents were included in the complete personnel file. In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them. Absent this information, the court cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein. Such a procedure is necessary to satisfy the Supreme Court's pronouncement that "the locus of decisionmaking" at a *Pitchess* hearing "is to be the trial court, not the prosecution or the custodian of records." (*People v. Mooc, supra,* 26 Cal.4th at p. 1229.) It is for the court to make not only the final evaluation but to make a record that can be reviewed on appeal.

No such record exists in this case. There is no indication that the trial court actually reviewed the list the city attorney submitted in support of the custodian of record's decision to produce no records for the court's examination. Moreover, we are unable to review that list because it was not included in the record on appeal and cannot be located. We therefore conditionally reverse the judgment and remand for a new *Pitchess* hearing in which the proper procedure is followed.

[[II.

Consolidation

Prior to trial, the court granted the prosecution's motion to consolidate the counts for misdemeanor battery upon a peace officer, felony resisting an executive officer, and misdemeanor resisting, obstructing, or delaying a police officer, which were originally charged by information on April 12, 2004, with the misdemeanor battery count that was charged by complaint on April 14, 2004. Guevara contends that consolidation of the domestic violence charge with the resisting charges violated his rights to due process and a fair trial because the offenses are not of the same class of crimes and he suffered prejudice as a result of the charges being tried together.

Consolidation, or joinder, is governed by section 954, which provides that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." The court's order granting consolidation is reviewed for an abuse of discretion. (*People v. Ochoa* (2001) 26 Cal.4th 398, 423.) The court cannot be said to have abused its discretion in this regard unless the defendant was prejudiced to the extent that he was effectively denied his constitutional right to a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8.)

Guevara fails to make such a showing here. The two misdemeanor battery charges were plainly of the same class of crimes, so they were properly consolidated for

trial pursuant to section 954. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) Moreover, Guevara cannot demonstrate any resulting prejudice. "'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to [consolidate or] sever trial.' [Citation.] [That ruling] may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

None of these criteria support a finding of prejudice in this case. Although the particular facts of the charged domestic battery were not relevant to the other charges, the January 8, 2004, incident of domestic violence was admissible to disprove Guevara's claim that the police used excessive force when they arrested him on January 20, 2004. It was also relevant that Silva had a restraining order against Guevara, and that Officers Maher and Samarin were following up on another domestic violence incident at the time. In other words, Guevara's history of domestic violence would have been admissible even if the domestic battery charge had been tried separately. Moreover, the charge of battery against Silva was not substantially more inflammatory than the other charges, and the evidence in support of all of the charges was relatively strong. Under the circumstances, the court did not abuse its discretion in consolidating the charges for trial.

III.

Evidence Code Section 1109

Guevara argues that the court violated his due process and fair trial rights by allowing two prior incidents of domestic violence to be admitted as propensity evidence pursuant to Evidence Code section 1109. To the extent he argues that Evidence

Code section 1109 is unconstitutional, our Supreme Court has concluded otherwise. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 [interpreting Evid. Code, § 1108]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1027 [concluding that the reasoning of *Falsetta* compels the conclusion that Evid. Code, § 1109 is constitutional].) Moreover, Guevara fails to demonstrate that the court abused its discretion in refusing to exclude the evidence under Evidence Code section 352. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) Evidence regarding Guevara's prior acts of domestic violence against Silva was highly relevant to the charged offense of committing a battery against her. To avoid the danger of undue prejudice, the court excluded two other incidents of violence and instructed the jury that the prior acts that were admitted were not relevant to the charges involving the police officers. Guevara also fails to establish a reasonable probability that he would have obtained a more favorable result had the evidence been excluded. As he acknowledges, he essentially conceded his guilt on the domestic battery charge. Accordingly, his claim that the court committed prejudicial error in admitting the prior acts of domestic violence fails.

IV.

Alleged Instructional Error

Guevara claims the court erred in giving a modified version of CALJIC No. 2.50.02.[3] He argues that the instruction, in conjunction with CALJIC Nos. 2.50.1 and

---

[3] The modified instruction provided as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence other than that charged in the case. [¶] 'Domestic violence' means abuse committed against an adult or a physically emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the defendant has had a child or is having or has had a dating or engagement relationship. [¶] 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another. [¶] If you find that the defendant committed a prior or subsequent offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit another offense involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by

2.50.2, "ensured that the jury considered appellant's prior incidents of domestic violence not just in determining his guilt with respect to the current misdemeanor domestic violence charge, but with respect to whether or not he was likely to or attempting to, absent the immediate physical intervention of the officers, engage in domestic violence on January [20], 2004." He also contends that "[a]bsent this propensity evidence and the fact that the jury was told [it] could consider it for the officers' state of mind, it is reasonably probabl[e] that the officers' actions would all have been seen by the jury as unlawful and appellant would not have been convicted of any crime."

Guevara forfeited his right to challenge the instruction because he failed to object to it below. Although the lack of an objection does not preclude our review of instructions that affect the defendant's substantial rights (§ 1259), the challenged instruction does not satisfy that standard. Our Supreme Court, in reviewing a virtually identical instruction, concluded that it does not impermissibly lower the prosecution's burden of proof. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016; see also *People v. Escobar, supra*, 82 Cal.App.4th at p. 1097, fn. 7.) Guevara's concern that the jury would construe the evidence as indicating that he was attempting to engage in violence against Silva on January 20 is unfounded because he was not charged with any offense against Silva on that date. Moreover, the jury was properly instructed it could consider the January 8 incident as bearing on the state of mind of Officers Maher and Samarin when they arrested Guevara on January 20, because Guevara argued that the officers had used unreasonable and excessive force in executing the arrest. Both of the experts testified that the officers' knowledge of Guevara's prior violent conduct was relevant to

---

itself to prove beyond a reasonable doubt that he committed the charged offense. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. [¶] Evidence of events occurring in October 2002 may not be considered for any other purpose. Events occurring on January 8, 2004, may also be considered for this purpose, and may additionally be considered for purposes of considering the state of mind of applicable peace officers on January 20, 2004." In reading the instruction, the court twice emphasized that the propensity evidence was irrelevant to the charges involving the police officers.

the determination whether they used excessive force. Because Guevara fails to demonstrate that the instruction affected his substantial rights, that instruction provides no basis for disturbing the judgment.

V.

Alleged Prosecutorial Misconduct

In her closing argument, Guevara's attorney argued that the police officers involved in the case had lied about the incident and had no legal justification for arresting Guevara on January 20. In rebuttal, the prosecutor argued that "[d]efense counsel's job is to get an acquittal. So she throws up that smoke screen. Let's put the officers on trial. And if we do that, we'll distract the jury from what the truth is." After Guevara's attorney objected to this argument as improper, the court told the jury " . . . there is a lot of finger pointing. There is the argument the prosecution's job is to get a conviction. But lawyers are doing their jobs. Okay? And one's job is to prosecute the case, which is what they're doing. Okay. Proceed." The prosecutor continued, and near the end of her argument she told the jury: "You get to make a statement here that you're not going to let people be violent with police officers and then come in and put them on trial."

Guevara contends that these arguments amount to prosecutorial misconduct. We agree with the People that Guevara waived his right to challenge the prosecutor's comments by failing to object to them below and request that the jury be admonished to disregard them. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Although Guevara objected to the first comment, he merely stated that the argument was improper and did not argue that the admonishment the court gave was insufficient to rectify the problem. As for the second statement, there was no objection at all. Under the circumstances, Guevara forfeited any right to challenge the prosecutor's statements on appeal.

In any event, the statements identified by Guevara did not amount to misconduct. "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive

or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore . . . , when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) In addressing that question, we do not "'. . . lightly infer'" that the jury drew the most damaging meaning from the prosecutor's comments. (*People v. Frye* (1998) 18 Cal.4th 894, 970.) Considered in context, the prosecutor's comments did not amount to misconduct. The prosecutor was entitled to comment on the state of the evidence and to criticize the defense's position. (See, e.g., *id.*, at pp. 977-978 [prosecutor did not commit misconduct by characterizing defense counsel's arguments as "'a smoke screen"']; *People v. Bell* (1989) 49 Cal.3d 502, 538 [prosecutor's statement that defense counsel's job was to "get his man off" and "throw sand in your eyes" properly conveyed to the jury that it should not be distracted from the relevant evidence].) The comments were also proper rebuttal to defense counsel's statements that the police officers in the case were liars. (See *United States v. Young* (1985) 470 U.S. 1, 12-13, fn. omitted [in evaluating claims of prosecutorial misconduct, court must "take into account defense counsel's opening salvo. . . . [I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction"].)

Moreover, it is not reasonably probable that Guevara would have obtained a more favorable result had the prosecutor not made the allegedly offending remarks. "We presume that jurors treat . . . the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Even if the prosecutor's comments were improper, there is no indication that they "involve[d] the use of deceptive or reprehensible methods to . . . persuade either the trial court or the jury." (*People v. Morales, supra,* 25 Cal.4th at p. 44.) Rather, the prosecutor's comments are logically construed as a legitimate attempt to undermine defense counsel's attack on the credibility of the police officers who were involved in the case. Besides, the evidence

of Guevara's guilt was overwhelming, so any error resulting from the prosecutor's comments would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

VI.

Alleged Impeachment Evidence Regarding Officer Samarin

On the first day of trial, the prosecutor informed the court and defense counsel that there had been a newspaper article about a Simi Valley police officer's allegations of sexual harassment against Officer Samarin. Before Officer Samarin was called to testify, Guevara's attorney indicated that he planned to cross-examine Officer Samarin on issues relating to the sexual harassment incident. Guevara argued that this line of questioning would be admissible as impeachment evidence pursuant to Evidence Code sections 1101 and 1103[4] and *People v. Wheeler* (1992) 4 Cal.4th 284, 295. The court denied Guevara's request. As a preliminary matter, the court doubted whether a non-conviction bad act would ever be admissible as impeachment evidence against a non-defendant witness. The court also found that the proffered evidence had almost no probative value, that the inflammatory nature of the evidence was "tremendous," and a "mini trial" would have to be conducted in order to establish the reliability of the accusations of sexual misconduct, which had been alleged by an individual who had been fired for conduct demonstrating moral turpitude. The court also noted that Guevara had failed to establish that unsubstantiated allegations of sexual harassment would be relevant to demonstrate that Officer Samarin had used excessive force against Guevara during his arrest or that Samarin had been less than truthful about the incident.

Guevara claims that the court abused its discretion in precluding him from questioning Officer Samarin about the allegations of sexual harassment because the

---

4 Evidence Code section 1103, subdivision (a) provides in pertinent part: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. . . ."

evidence was relevant "to demonstrate that on the date of the incident, Samarin acted in conformity with his bullying nature." He also argues that "[t]he fact that there was a lawsuit involving Samarin's conduct which was settled adversely to the City, may also have meant that Samarin was on a short string with the Simi Valley Police Department and thus had more than the usual motive to fabricate his testimony in order to ensure he was not disciplined for misconduct."

The trial court did not err in precluding Guevara from pursuing his line of questioning. Evidence of uncharged offenses is highly prejudicial and is admissible only if it has substantial probative value. (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 116.) Although evidence of a police officer's tendency to violence is admissible under Evidence Code section 1103 in a case in which the defendant is charged with battery on a police officer or resisting arrest (see *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 163), the allegations of sexual harassment against Officer Samarin did not involve violence. Moreover, the trial court did not abuse its discretion in concluding that the evidence, even if relevant, should be excluded under Evidence Code section 352 because it would require a "mini trial" that would consume time and distract the jury. Officer Samarin was one of four officers involved in Guevara' s arrest, and there is no factual dispute regarding his participation in the incident.

To the extent Guevara claims that the court violated his federal constitutional rights, he forfeited those claims by failing to raise them below. (See *People v. Smithey* (1999) 20 Cal.4th 936, 995.) In any event, Guevara's due process rights were not violated by the proper application of evidentiary rules. (See *People v. Lucas* (1995) 12 Cal.4th 415, 464.) Moreover, his right to confront and cross-examine Officer Samarin did not amount to a Sixth Amendment violation because he fails to demonstrate that the prohibited cross-examination would have produced "'. . . "a significantly different impression of [his] credibility. . . ." . . .'" (*People v. Belmontes* (1988) 45 Cal.3d 744, 780.) Officer Samarin's testimony was uncontradicted and conformed with the testimony of the other officers involved in the incident. Because

evidence regarding the allegations of sexual harassment was irrelevant to the determination whether Officer Samarin used excessive force, any probative value in that evidence was substantially outweighed by other factors. Guevara's constitutional rights were not violated by its exclusion.

VII.

Lesser Included Offense

Guevara contends the court had a sua sponte duty to instruct the jury that misdemeanor resisting, delaying, or obstructing a peace officer (§ 148)[5] is a lesser included offense to resisting an executive officer (§ 69).[6] We disagree. "[R]esisting is not a lesser included offense of deterring since one can deter an officer's duty *in the future* (§ 69) without resisting the officer's discharge or attempted discharge of a duty *at that time*." (*People v. Belmares* (2003) 106 Cal.App.4th 19, 23-24; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532; see also *In re Manuel G.* (1997) 16 Cal.4th 805, 817, fn. omitted ["the plain language of [section 69] encompasses attempts to deter *either* an officer's *immediate* performance of a duty imposed by law or the officer's performance of such a duty at some time *in the future*"]; cf. *People v. Esquibel* (1992) 3 Cal.App.4th 850, 854-855 [assuming without deciding that section 148 is a lesser included offense of section 69].) Although section 148 may be properly characterized as a lesser *related* offense of section 69 in that section 148 does not involve force or violence (see *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1279-1280), Guevara had no right to

---

5 Section 148, subdivision (a)(1) provides: " Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

6 Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

instructions on the lesser related offense absent the prosecutor's consent. (*People v. Birks* (1998) 19 Cal.4th 108, 112-113.) Here, there is no dispute that Guevara used force or violence against Officer Maher. Guevara's defense was that he was not guilty of resisting arrest because the arrest was rendered unlawful by the use of excessive force. Moreover, because it is not reasonably probable that Guevara would have obtained a more favorable result had the jury been instructed that section 148 was a lesser included or lesser related offense of section 69, any error in failing to instruct the jury in this regard was harmless.[7]

VIII.

The Court's Refusal to Reduce the Section 69 Charge to a Misdemeanor

Guevara argues that the court abused its discretion in refusing to reduce his section 69 conviction to a misdemeanor pursuant to section 17, subdivision (b). That section "authorizes the reduction of 'wobbler' offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison (§ 17(b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17(b)(3))." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975, fn. omitted.) We review the court's decision to treat Guevara's section 69 conviction as a felony for an abuse of discretion (*id.*, at p. 977), and discern no error.

In determining whether to reduce a wobbler to a misdemeanor, courts consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.]" (*People v. Superior Court* (*Alvarez), supra*, 14 Cal.4th at p. 978.) The court must also consider the defendant's criminal history. (*Id.*, at pp. 981-982.) In concluding that Guevara's conviction should be treated as a felony, the court noted that he had demonstrated a complete lack of respect for law enforcement and

---

[7] Because we reject each of Guevara's claims of error, we also reject his claim that the errors were cumulative.

had continued to disclaim any responsibility for his actions. The probation report also indicates that Guevara is an "illegal alien" and has prior convictions for theft and failure to appear. Under the circumstances, it cannot be said that the court abused its discretion in denying Guevara's request to reduce his felony offense to a misdemeanor.

IX.

Denial of Probation

Guevara also complains that the court denied his request for probation. The court's decision in this regard was a matter of discretion (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282), and that decision can be reversed only upon a showing that it was arbitrary or capricious. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) After considering all of the relevant criteria, the court denied Guevara's request because he was not remorseful for his crimes, presented a danger if not in prison, and did not have the ability to comply with reasonable terms of probation. (Cal. Rules of Court, rules 4.414(b)(4), (7) & (8).) Because the court considered all of the relevant factors and there is no showing that its decision to deny probation was arbitrary or capricious, the court did not abuse its discretion in denying Guevara's request for probation.]]

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new in camera hearing on Guevara's *Pitchess* motion in conformance with the procedures described in this opinion. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct such further proceedings as are necessary and appropriate. If the court again finds there are no discoverable records, or that there is discoverable information but Guevara cannot establish that he was prejudiced by the denial of discovery, the judgment shall be

affirmed as of that date. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 423.)

CERTIFIED FOR PARTIAL PUBLICATION.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Mary Jo Graves, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth N. Sokoler, Alan D. Tate, Deputy Attorneys General, Susan D. Martynec, Supervising Deputy Attorney General, for Plaintiff and Respondent.